

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

August 15, 2000

GSBCA 15286-RELO

In the Matter of ROSS K. RICHARDSON

Ross K. Richardson, Denton, TX, Claimant.

Gary D. Johnson, Chief Financial Officer, Office of Financial Management, Federal Emergency Management Agency, Washington, DC, appearing for Federal Emergency Management Agency.

DeGRAFF, Board Judge.

The selection and transfer of an employee pursuant to a merit promotion program is an action taken in the interest of the Government unless there is a valid agency regulation to the contrary. Because there was no such regulation in place here, the agency should reimburse claimant for his allowable relocation expenses, provided that he is otherwise eligible to be reimbursed.

Background

In May 1999, the Federal Emergency Management Agency (FEMA) posted a vacancy announcement for a position in Texas, which is part of FEMA's Region VI. Applicants nationwide were eligible to apply for the position. The announcement did not say whether FEMA would reimburse the successful applicant for relocation expenses.

Ross Richardson was a FEMA employee in Missouri, which is part of FEMA's Region VII. Mr. Richardson applied for the position in Texas, and FEMA officials told him that he would be reimbursed for his relocation expenses, provided funds were available. These officials were from both Regions VI and VII, and included the selecting official, who was the Director of Region VI.

FEMA selected Mr. Richardson for the position in Texas. When FEMA formally offered the position to Mr. Richardson, someone in FEMA's personnel office told him that FEMA would not reimburse him for the relocation expenses he would incur in connection with his transfer. Nonetheless, Mr. Richardson accepted FEMA's job offer. The position

in Texas was at a higher pay grade than Mr. Richardson's position in Missouri, so he would receive a promotion when he transferred.

On September 29, 1999, after Mr. Richardson accepted the position in Texas, FEMA's Washington, D.C. office issued a memorandum to senior management officials within FEMA in order to "remind" them of FEMA's policy regarding the authority to reimburse employees for relocation expenses. The memorandum explained that when a position was advertised that might result in a promotion and applicants from beyond the commuting area were invited to apply for the position, FEMA's policy was to state on the vacancy announcement, "Permanent Change of Station (PCS) is not authorized." Apparently, FEMA meant that it would not reimburse the successful applicant for any relocation expenses. If the selecting official wanted to be able to reimburse the successful applicant for relocation expenses, the selecting official was required to submit a request to FEMA's Chief Financial Officer (CFO) and obtain approval to reimburse expenses before issuing the vacancy announcement. If approval was granted, the vacancy announcement was supposed to state, "Permanent Change of Station (PCS) is authorized for the filling of this position." By this, FEMA apparently meant that it would reimburse the successful applicant for relocation expenses.

Mr. Richardson reported for duty in Texas on October 10, 1999. On November 12, 1999, he asked FEMA to reimburse his relocation expenses. On December 28, 1999, FEMA's CFO denied Mr. Richardson's request. The CFO explained to Mr. Richardson that FEMA was denying his request for reimbursement because FEMA told him when it offered him the position in Texas that it would not reimburse him for his relocation expenses, and because he incurred relocation expenses without any written authorization that they would be reimbursed. The CFO stated that it was FEMA's policy that reimbursement had to be authorized, in advance, by the Director of FEMA, after consulting with the Director of FEMA's Office of Human Resources Management and FEMA's CFO.

After FEMA denied Mr. Richardson's request for reimbursement, the Director of FEMA's Region VI wrote to the Director of FEMA concerning Mr. Richardson's situation. The Director of Region VI stated that he believed that Mr. Richardson had been "caught in the middle of a policy decision, which had not been fully implemented" at the time he relocated. The regional director said that until the September 29, 1999 memorandum was issued clarifying FEMA's "new policy," there had been no uniform FEMA system for authorizing the payment of relocation benefits. The Director of Region VII concurred in the letter written by the Director of Region VI. Consistent with the views of the two regional directors, Mr. Richardson says that before the September 29 memorandum was issued, FEMA's policy was not clear and FEMA's vacancy announcements did not contain any statement concerning relocation benefits.

After Mr. Richardson asked us to review FEMA's decision to deny his request for reimbursement, FEMA told us that the procedure set out in the September 29 memorandum is "a longstanding FEMA policy" applicable to merit promotions. FEMA said that Mr. Richardson's request for reimbursement was not in accordance with FEMA guidelines that make the selecting official responsible for notifying the CFO, in advance, whenever a recruitment action might result in the need for relocation benefits. FEMA also pointed out that Mr. Richardson accepted the job in Texas after being told that FEMA would not reimburse his relocation expenses.

Discussion

By statute, when an employee is transferred “in the interest of the Government” from one official duty station to another, the Government is required to reimburse the employee for some relocation expenses (travel, transporting household goods, real estate transactions), and it has the discretion to reimburse the employee for other relocation expenses (one house hunting trip to the new duty station, temporary quarters subsistence expenses, moving a privately owned vehicle to the new duty station). 5 U.S.C. §§ 5724, 5724a, 5727 (1994 & Supp. IV 1998).

Unless there is a valid agency regulation to the contrary, the selection and transfer of an employee pursuant to a merit promotion program is an action taken in the interest of the Government. Darrell M. Thrasher, GSBCA 13968-RELO, 97-2 BCA ¶ 29,214; Eugene R. Platt, 59 Comp. Gen. 699 (1980), aff'd on reconsideration, 61 Comp. Gen. 156 (1981).¹ The Comptroller General's reconsideration decision in Platt provided guidance concerning the kind of regulation that would allow an agency to determine that such a transfer is not in the interest of the Government. A regulation should “state the specific conditions and factors which would be considered” in determining “in any particular case” whether a transfer is in the interest of the Government. For example, the regulation might say that an agency would consider labor market conditions, such as whether candidates are available locally to fill the position. In addition, an adequate regulation should require that such guidance “be clearly communicated in advance and in writing to all applicants, preferably by a statement on the vacancy announcement,” so that those who applied would do so “with an understanding of the conditions under which relocation expenses will or will not be paid.” 61 Comp. Gen. at 162.

FEMA contends that Mr. Richardson's request for reimbursement should be denied because it was not in accordance with FEMA's longstanding policy, reflected in the September 29 memorandum, concerning reimbursement of relocation expenses in the case of a merit promotion. There are at least two reasons for rejecting FEMA's contention.

First, we are not convinced that there was any longstanding FEMA policy in place when FEMA issued the vacancy announcement and selected Mr. Richardson for his position. Two of FEMA's regional directors clearly did not know about the policy, which they described as something new that had not been fully implemented. The regional directors and Mr. Richardson say that there was no previous uniform FEMA policy, and in support of this, Mr. Richardson points out that prior FEMA vacancy announcements did not contain the language that was required by FEMA's supposedly longstanding policy. FEMA offered nothing to rebut the statements of the regional directors and Mr. Richardson.

Second, and more important, when FEMA issued the vacancy announcement for the Texas position and when it selected Mr. Richardson for that position, it had no regulation in place that would have allowed it to determine that a merit promotion transfer was not in the interest of the Government. Even if FEMA had a longstanding policy in place, a longstanding policy does not take the place of the regulation required by Platt. Although

¹Until mid-1996, the Comptroller General resolved claims for relocation expenses.

FEMA says that its policy is summarized in its September 29, 1999 memorandum, FEMA distributed the memorandum to a select group of addressees who were senior management officials, and did not publish the memorandum by, for instance, incorporating it into an agency manual or handbook. The memorandum said that it was intended to remind the addressees of a FEMA policy, and did not say that it was intended to establish that policy. We are not convinced that the September 29 memorandum, which was of limited distribution and which served only as a reminder to those few who received it, was a regulation. In addition, the memorandum was not in effect either when FEMA issued the vacancy announcement for the position in Texas or when it selected Mr. Richardson for that position, and so the memorandum does not apply to the vacancy that Mr. Richardson was selected to fill.

FEMA's second contention is that Mr. Richardson should be barred from claiming reimbursement for his relocation expenses because he accepted his job offer after someone in FEMA's personnel office told him that he would not be reimbursed for relocation expenses.² We reject FEMA's argument for the same reason that the Comptroller General rejected it when agencies raised it there:

The reimbursement of an employee for relocation expenses incurred incident to a transfer in the interest of the Government is a right pursuant to law and regulations. Thus, the fact that an employee may evidence his acquiescence in the agency's determination that he forgo reimbursement of transfer expenses does not preclude reimbursement if the transfer is found to be in the interest of the Government.

Bruce E. Stewart, B-201860 (Aug. 27, 1982); accord Platt ; Rudd and Erickson, B-211910 (Sept. 26, 1983). Because the personnel office imposed an invalid condition on Mr. Richardson's offer, he is not bound even if he agreed to accept that condition. In addition, the absence of a travel authorization does not bar reimbursement, so the fact that FEMA did not issue an authorization to Mr. Richardson in advance of his transfer does not bar his claim. Rudd and Erickson.

Decision

In the absence of an agency regulation to the contrary, we conclude that Mr. Richardson's transfer was in the interest of the Government. FEMA should reimburse him for his allowable relocation expenses, provided that he is otherwise eligible.

MARTHA H. DeGRAFF
Board Judge

²Of course, Mr. Richardson also accepted the offer after officials in two FEMA regional offices told him that he would be reimbursed for his expenses.

